UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

BRAINWARE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 3:11cv755-REP**
	)	
SCAN-OPTICS, LTD.	)	
and	)	
SCAN-OPTICS, LLC,	)	
	)	
Defendants.	)	

PLAINTIFF'S BRIEF
CONCERNING PRIVILEGE LOGS

COMES NOW Plaintiff, Brainware, Inc. ("Brainware"), by counsel, and files this Brief Concerning the Privilege Logs of Defendants Scan-Optics, Ltd. ("Scan-Optics UK") and Scan-Optics, LLC ("Scan-Optics USA"). This Brief responds to the *Brief Regarding Certain Materials Scan-Optics LLC has Withheld as Privileged*, (ECF 62) ("Scan-Optics USA's Brief"). It also responds to *Defendant Scan Optics, Ltd.'s Memorandum in Support of Withholding Certain Privileged Documents*, (ECF 63) ("Scan-Optics UK's Brief").

I. Background

At issue here are various email communications withheld from discovery by Scan-Optics USA and Scan-Optics UK on the basis of the attorney-client privilege, the work product doctrine, or both. Brainware raised questions and objections concerning certain categories of communications identified on their privilege logs. The parties conferred in an effort to narrow the disputed items. As a result of these discussions, Scan-Optics UK agreed that 99 of the 177 items it initially claimed were protected should be removed from its privilege logs.[1] Scan-Optics USA agreed that 15 of the 79 items identified on its log should be removed. But the parties have been unable to resolve all of the items in question.[2]

For convenience, Brainware organizes the remaining disputed items into four (4) categories as follows:

Category 1: Patriarch Communications. The first, and largest, category of disputed items includes email communications exchanged between one or both Defendants and two in-house corporate lawyers employed by non-party Patriarch Partners, LLC ("Patriarch").[3]

Patriarch is described by Scan-Optics USA as "the collateral manager of investment funds that own controlling equity stakes in approximately 75 'portfolio companies,' including Scan-Optics USA which, in turn, is the sole shareholder of Scan-Optics UK." (Scan-Optics Br. at 2.) It is also claimed that "Patriarch and the investment funds are under common ownership." (Declaration ("Decl.") of Carolyn Schiff ¶ 1, (ECF 62-3).) The identity of the "common" owners is not revealed, nor is the nature or degree of their ownership of Patriarch and the "funds" described.

The logs of Scan-Optics USA and Scan-Optics UK reveal that Patriarch lawyers Carolyn Schiff ("Schiff") and Robert Sweeny ("Sweeny") either sent, received, or were copied on numerous relevant email communications during the time period May 12, 2011 to September 7,

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[1] This includes a January 6, 2012 privilege log and a January 20, 2012 "supplemental" privilege log. Last week, on June 6, 2012, and in an effort to designate even more items as privileged, Scan-Optics UK served a "Second Supplemental Privilege Log." The late designation of the items on the "Second Supplemental" log will be addressed in Part III.D below.

[2] As of the filing of this Brief, none of the items that Scan-Optics UK and Scan-Optics USA have agreed to remove from their logs have actually been produced to Brainware.

[3] Referring to Scan-Optics USA's privilege log, this category includes item numbers 7, 8, 11, 12, 16-22, 23, 27-34, 36-40, 44-46, 51-52, 54-57, 59-63 and 66-72. Referring to Scan-Optics UK's privilege log, this category includes item numbers 75-80, 83-88, 92-97, 101-102, 107-112, 117, 136 and 143.

2011. All of these communications are being withheld on the basis of the attorney-client privilege and the work product doctrine even though Schiff and Sweeny work for Patriarch.

On Scan-Optics USA's log, the communications in this category are exclusively between Schiff or Sweeny, on the one hand, and non-lawyer representatives of Scan-Optics USA or Scan-Optics UK, on the other. No lawyers for Scan-Optics UK are identified as authoring, receiving or being copied on these communications in Scan-Optics USA's log, and no lawyer representing Scan-Optics USA is identified, either. In addition, the items are dated between May 12, 2011 and September 7, 2011, five months before Scan-Optics USA was added as a party.

On Scan-Optics UK's log, however, many of the communications in this category involve trial counsel for Scan-Optics UK, Daniel Fitch or Lauren Darden, while others do not. The communications on Scan-Optics UK's log that fall into this category are dated between August and November 2011.

In Defendants' Briefs and the attached declarations, no explicit representation is made that Schiff and Sweeny were retained to "jointly represent" Patriarch, Scan-Optics USA and Scan-Optics UK. The declarations simply recite that these lawyers were "asked to provide, and did provide, legal advice to Scan-Optics USA and Scan-Optics UK in connection with the dispute giving rise to this lawsuit." (ECF 62-2 ¶ 2 (Decl. of Sweeny); ECF 62-3 ¶ 2 (Decl. of Schiff).) Their argument is, generally speaking, that corporate "affiliates" may freely share privileged information without waiving the privilege or the work product protection.

The issue here is whether the attorney-client privilege and the work product doctrine extend to include communications with a third party "manager" like Patriarch, who does not manage or itself own a stake in the party seeking to prevent disclosure. Brainware contends that Patriarch's status as a manager of investment funds that own Scan-Optics USA is too removed to treat Patriarch and the Defendants in this case as the same client for purposes of the privilege. Brainware also contends that the so-called "common interest rule" does not apply to protect any work product or privileged communications shared with Patriarch because Patriarch and the Defendants have not executed a joint defense or common interest agreement, their legal interests and role in this matter are not the same, and many of the communications do not involve an attorney on both sides of the communication.

Of course, the foregoing argument also assumes in the first instance that the items are indeed privileged or protected, a point Brainware cannot concede without seeing the documents. As to the communications on Scan-Optics USA's log, however, for which the work product doctrine is claimed, Brainware disputes that Scan-Optics USA anticipated litigation against it between May 2011 and September 2011. Therefore, communications between Patriarch's lawyers and Scan-Optics USA personnel during that timeframe were not generated in anticipation of litigation.

Category 2**: Communications between Scan-Optics UK lawyers and Scan-Optics USA Business Persons.** The second category includes communications between business persons employed by the parent company, Scan-Optics USA, and trial counsel for the subsidiary, Scan-Optics UK.[4] These communications are confined to the month of September 2011. This was three months before the initial Complaint was filed against Scan-Optics UK, and five months before Scan-Optics USA was added as a party defendant. In other words, these communications occurred well before Scan-Optics USA anticipated being directly involved in the suit. No attorney representing Scan-Optics USA was involved in these communications –

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[4] The items falling into this category include numbers 121-123 and 125-127 on Scan-Optics UK's log, and 47 and 75-79 on Scan-Optics USA's log. The lawyers are Daniel Fitch and Lauren Darden.

only business persons. Moreover, it is undisputed that Mr. Fitch and Ms. Darden represent only Scan-Optics UK, not the parent.

Brainware contends that these communications may not qualify as attorney-client privilege or work product communications because Scan-Optics USA is not a client of Mr. Fitch and Ms. Darden, no attorney representing Scan-Optics USA participated in the communications, the parties did not share a sufficient common legal interest in defending the suit at the time the communications were created, and Scan-Optics USA did not anticipate litigation against it at that time.

Category 3: Communications Involving No Attorney. This category includes communications involving no attorney at all.[5] Scan-Optics USA maintains that these communications "reflect legal advice" of an undisclosed attorney "regarding potential Brainware litigation." The attorney-client privilege and the work product doctrine are asserted as to all of them even though no attorney is identified. Moreover, the communications are between business persons at Scan-Optics USA and business persons at Scan-Optics UK, thereby raising the issue of waiver. The identity of the attorney whose advice is allegedly "reflected" in these communications is not revealed, so it is impossible to tell whether that attorney is an attorney representing Scan-Optics USA or some other party, like Patriarch, and it is impossible to judge whether the advice is truly "legal" advice or some other advice, such as "business" advice. And the timing of the communications – September 6, 2011 to September 12, 2011 – is well before Scan-Optics USA anticipated litigation between it and Brainware. On Scan-Optics UK's log, this category includes item number 74. This document is an August 23, 2011 "draft letter" between two business persons at Scan-Optics UK that allegedly includes "information gathered

[5] On Scan-Optics USA's log, this includes item numbers 53, 58, 64, 65, 73 and 74. On Scan-Optics UK's log, this includes item number 74, a "draft letter" between two businessmen.

to obtain legal advice." The document is not represented to be a communication with a lawyer for purposes of obtaining legal advice.

Category 4: Items not Identified by Scan-Optics UK on its Logs. The fourth category includes communications between Scan-Optics USA and Scan-Optics UK that were identified on Scan-Optics USA's log, but that were not identified by Scan-Optics UK on its log.[6] That explains the dispute. Because the items were not identified on Scan-Optics UK's log, Brainware asked that they be produced by Scan-Optics UK. In response, Scan-Optics UK served Brainware with a "Second Supplemental Privilege Log" on June 6, 2012 purporting to identify these communications as being privileged for the very first time. Brainware contends that this late designation is not sufficient to recover the privilege, which has already been waived. Brainware also contends that the items falling into this category are not privileged or protected in the first instance, for the reasons discussed above in Categories 1, 2 and 3.

II. Legal Standard Applicable to Claims of Privilege or Protection

Because the application of the attorney-client privilege and the work product doctrine "remove otherwise pertinent information from the fact finder, thereby impeding the full and free discovery of the truth," see Rambus, Inc. v. Infineon Technologies AG, 220 F.R.D. 264, 271 (E.D. Va. 2004), "in the Fourth Circuit, work product and attorney-client privilege are construed 'quite narrowly,'" ePlus Inc. v. Lawson Software, Inc., 2012 U.S. Dist. LEXIS 21636, 7-9 (E.D. Va. Feb. 21, 2012) (citing Rambus). These protections are recognized "only to the very limited extent that…excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Rambus, 220 F.R.D. at 271 (quoting Hawkins v. Stables, 148 F.3d 379, 383 (4th Cir. 1998)).

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[6] These items include item numbers 53, 58-66 and 73-74 on Scan-Optics USA's log.

"Communications within a corporation are only protected if the party claiming privilege can demonstrate that the persons to whom the communications were made had the 'need to know' the information communicated." ePlus Inc., 2012 U.S. Dist. LEXIS 21636 at *14 (citing and quoting Deel v. Bank of America, N.A., 227 F.R.D. 456, 460 (W.D. Va. 2005)). The same principle would seem to apply even more forcefully to communications between separate legal entities claiming protection under a "common interest" or "joint defense" theory.

A party asserting a privilege has the burden of showing that it applies. Id. (citing United States v. Under Seal, 341 F.3d 331, 335 (4th Cir. 2003)). Amongst other things, the party asserting attorney-client privilege must establish that:

> (2) the person to whom the communication was made . . . act[ed] as a lawyer [in connection with the communication]
> (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding . . .
> (4) the privilege has been (a) claimed and (b) not waived by the client.

Id. (quoting Hawkins, 148 F.3d at 383). The party asserting the work product doctrine "must establish that the document at issue was prepared at the direction of an attorney in anticipation of litigation." Id. (citing Hickman v. Taylor, 329 U.S. 495 (1947)).

With respect to the adequacy of a party's privilege log, this Court has previously ruled that,

> Parties seeking to challenge a claim of privilege have sparse information at their disposal. Because they do not actually have access to the privileged documents, they must rely on the opposing party's description of them in the privilege log. Accordingly, the descriptions in the log must satisfy the claiming party's burden.

ePlus Inc. v. Lawson Software, Inc., 2012 U.S. Dist. LEXIS 21636, 7-9 (E.D. Va. Feb. 21, 2012) (citing and quoting Rambus, 220 F.R.D. at 272).

III. Application of Law to Withheld Items

A. Communications exchanged with lawyers employed by Patriarch are not privileged or protected from discovery ("Category 1").

Patriarch is not a party to this litigation. It is not a party to the contract at issue in this case. It has no ownership interest in either Defendant. It is not a "parent" or even a "grand parent" of either Defendant. It has no direct contractual relationship with either Defendant. Finally, no claim has been made that Patriarch has formed any sort of "joint defense agreement" or "common interest agreement" with the Defendants with respect to this litigation. The most that can be said about Patriarch is that it "manages" various offshore "investment funds" that own Scan-Optics USA who, in turn, owns Scan-Optics UK, and that Patriarch and the "investment funds" share a "common owner." (Decl. of Schiff ¶ 2 (ECF 62-3).) With this as their foothold, Scan-Optics USA and Scan-Optics UK maintain that they are sufficiently "affiliated" with Patriarch such that they should all be considered one client for purposes of the privilege analysis. (See Scan-Optics USA Br. at 2, n.2 (citing cases).)

The problem with the "affiliate" argument is that it muddles important distinctions in the legal analysis. In particular, the argument mixes two distinct situations: (1) the situation in which multiple clients hire a single lawyer to represent them jointly and (2) the situation in which the lawyers for separate clients share information with each other pursuant to a "common interest" or a "community of interest" arrangement. As the Third Circuit has explained, when the dispute concerns communications between separate legal entities, the analysis should ordinarily focus on whether the separate entities are jointly represented by a single attorney, not on whether the corporations share a community of interest (or a common interest). That is because:

> absent some compelling reason to disregard entity separateness, in the typical case courts should treat the various members of the corporate group as the separate corporations they are and not as one client. * * * [I]t assumes too much to think that members of a corporate family necessarily have a substantially

> similar legal interest (as they must for the community-of-interest privilege to apply), in all of each other's communications. Thus, holding that parents and subsidiaries may freely share documents without implicating the disclosure rule because of a deemed community of interest stretches, we believe, the community-of-interest privilege too far.

Id. at 372.

The first question, then, is whether Patriarch's in-house lawyers were ever truly "retained" by Scan-Optics USA and Scan-Optics UK to "jointly represent" them with respect to this litigation. Neither the Declaration of Robert Sweeny, (ECF 62-2), nor the Declaration of Carolyn Schiff, (ECF 62-3), include an assertion that Sweeny and Schiff were retained to jointly represent Patriarch, Scan-Optics USA and Scan-Optics UK with respect to the Brainware litigation. See In re: Teleglobe Communications Corp., 493 F.3d at 363 (3rd Cir. 2007) ("The keys to deciding the scope of a joint representation are the parties' intent and expectations, and so a district court should consider carefully (in addition to the documents themselves) any testimony from the parties and their attorneys on those areas.").

Moreover, all of the communications sought to be withheld from production were created in 2011, well before Scan-Optics USA even knew that it would be added as a party to the litigation in Brainware's First Amended Complaint. This indicates that, when the communications were created, Patriarch and Scan-Optics USA did not "share the same legal interest" with Scan-Optics UK as to the litigation involving Brainware, a point that weighs against concluding that they actually hired the same lawyer. See In re Teleglobe Corporation, 493 F.3d at 366 ("their legal interests must be identical (or nearly so) in order that an attorney can represent them all with the candor, vigor, and loyalty that our ethics require").

Even under a "common interest" rule analysis, however, the argument that the Patriarch communications are privileged or protected does not hold up under scrutiny. The Fourth Circuit has endorsed the concept of a "common interest privilege" or "rule." See In re Grand Jury Subpoenas, 902 F.2d 244. However, it has done so in the context of: (1) a parent and its wholly owned subsidiary, (2) who clearly shared the same legal interest in a litigation matter, which they jointly prosecuted, and (3) who executed a joint defense agreement memorializing their agreement to cooperate with each other in their joint defense of the action. Id. Under those circumstances, the Fourth Circuit has held that communications between the parent and the subsidiary were protected by the "common interest rule." See also United States v. Duke Energy Corp., 214 F.R.D. 383, 388-89 (M.D.N.C. 2003) ("Duke Energy must show an agreement among all members [of the group] to share information as a result of a common legal interest relating to ongoing or contemplated litigation"). The Third Circuit has also pointed out that, for the common interest rule to apply, each party must be separately represented by its own lawyer, and the communications should be between the lawyers to formulate a common defense, not the clients themselves. In re Teleglobe, 493 F.3d at 364-65.

The situation here does not qualify. The parties – Scan-Optics USA in particular – are not represented by separate counsel, and the communications are not between counsel for each party. Patriarch shares no legal interest in the litigation with Scan-Optics UK or Scan-Optics USA. Moreover, when the communications were created, Scan-Optics USA did not even share a legal interest with Scan-Optics UK. In addition, Patriarch's relationship to the Defendants is too remote to be analogous to the parent/subsidiary relationship at issue in In re Grand Jury Subpoenas, or in the cases cited by Scan-Optics USA and Scan-Optics UK. For instance, the cases cited by Scan-Optics USA on pages 2 and 3 of its Brief generally involve very close ownership affiliations, such as the "wholly-owned subsidiary" sharing communications with its "parent" company in a situation when they have the same legal interest in a matter. No bright line test exists to know how closely related two companies must be for them to be considered the same client for purposes of the privilege. However, the authorities cited by Scan-Optics USA and Scan-Optics UK establish that the extension of the privilege to "affiliates" has limitations. The treatise by Edna Selan Epstein cited on page 2 of Scan-Optics USA's Brief, states that corporations must "demonstrate sufficient interrelatedness" to be considered as "one entity for attorney-client privilege purposes," and that this showing may be made "if they either are closely affiliated or share the same legal interest." (emphasis added). Scan-Optics USA and Scan-Optics UK are not closely affiliated with Patriarch, as in a wholly-owned parent/subsidiary relationship. And they do not have the same legal interest as Patriarch in this litigation. Thus, the common interest rule does not fit.

As the legal relationship between the parties becomes more distant, the policy considerations underlying the discovery rules begin to outweigh those underlying the attorney-client privilege. See United States v. Under Seal, 748 F.2d 871, 875 (4th Cir. 1984) (the attorney-client privilege is "inconsistent with the general duty to disclose and impedes the investigation of the truth"). Indeed, assertions of attorney-client privilege are not favored by federal courts and are "to be strictly confined within the narrowest possible limits consistent with the logic of its principle." In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984). These considerations led one district court in the Fourth Circuit to observe that, "there does not appear to be a pressing societal need for the extension of the joint defense/common interest rule. Consequently, the Fourth Circuit would likely proceed cautiously in this area…" Duke Energy, 214 F.R.D. at 388. Duke Energy sought to protect from discovery certain communications it had with an industry trade group. Hunton & Williams represented both the trade group and Duke Energy. The district court "concluded that in order for the attorney-client privilege to be expanded by the joint defense/common interest rule, Duke Energy must show an agreement among all members [of the group] to share information as a result of a common legal interest relating to ongoing or contemplated litigation. This expansion only applies to the exchange of information which falls within the agreed shared interest." Id. at 388-89.

Here, Scan-Optics UK and Scan-Optics USA have failed to establish that Patriarch's in-house lawyers were employed to jointly represent the three entities with respect to the Brainware litigation. Moreover, the remoteness of Patriarch to Scan-Optics USA and Scan-Optics UK, the lack of a shared legal interest in the Brainware litigation, and the Fourth Circuit's hostility toward expanding a privilege that is not favored weigh against finding that the communications to and from Patriarch are privileged under a common interest rule extension of the privilege.

Scan-Optics UK points out in its brief that the waiver rules for work product are distinct from those applicable to the attorney-client privilege and that, even if the privilege has been waived as to those items it shared with Patriarch, the work product protection has not been waived as to those items. (Scan-Optics UK Brief at 12-14.) It is correct that work product is not as easily waived. However, the party seeking to prove non-waiver must show that the recipient shared "an interest common" to the disclosing party. In re Doe, 662 F.2d 1073, 1081 (4th Cir. 1981). For the same reasons described above in the discussion of the common interest rule, Patriarch's connection with Scan-Optics UK is far too distant, and the two entities did not share a common legal interest in the Brainware matter.

Finally, with respect to items that Scan-Optics USA claims are work product that it shared with Patriarch, neither Scan-Optics USA nor Patriarch anticipated litigation against Brainware at the time of these communications. The only litigation anticipated was between

Scan-Optics UK and Brainware. Moreover, to the extent such communications involved no attorney, they are not work product. See infra Part II.

B. Communications between litigation counsel for Scan-Optics UK and business persons employed by Scan-Optics USA are not protected from discovery by the common interest rule ("Category 2").

Both Scan-Optics UK and Scan-Optics USA have refused to produce communications between Scan-Optics UK's trial counsel, Daniel Fitch and Lauren Darden, and non-lawyer business persons employed by Scan-Optics USA. The dispute over the discoverability of these communications focuses exclusively on the "common interest rule" and is not a "joint representation" situation because it is undisputed that Mr. Fitch and Ms. Darden do not jointly represent both Scan-Optics USA and Scan-Optics UK. They represent Scan-Optics UK only. Thus, the question is whether the common interest rule applies to a subsidiary's trial lawyers sharing otherwise privileged or protected communications with non-lawyer business persons employed by the parent company, a company with which they enjoy no attorney-client relationship.

As with the other categories of disputed communications at issue here, it is not at all clear that the communications are covered in the first instance by either the attorney-client privilege or the work product doctrine.[7] If they are not, then the materials should be produced irrespective of whether the "common interest rule" might apply here, because "the joint defense or common interest rule presupposes the existence of an otherwise valid privilege, and the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine." In re Grand Jury Proceedings, 902 F.2d at 249.

[7] See infra Part II (discussing the elements of the attorney-client privilege and the work product doctrine and the burdens involved).

The Fourth Circuit has recognized that, "[t]he concept of a joint defense privilege first arose in the context of criminal co-defendants whose attorneys shared information in the course of devising a joint strategy for their clients' defense." In re Grand Jury Subpoenas, 902 F.2d at 248 (emphasis added). Notwithstanding its roots in criminal law, the Fourth Circuit has accepted the application of the "joint defense" or "common interest" rule in civil cases and has even held that it applies to co-plaintiffs. Id. at 249. Less clear is whether an attorney must be present on both sides of the communication for the rule to apply.

The Third Circuit has addressed this issue and has stated that an attorney must be present on both sides of the communication for the common interest rule to apply.

> The requirement that the clients' separate attorneys share information (and not the clients themselves) derives from the community-of-interest privilege's roots in the old joint-defense privilege, which (to repeat) was developed to allow attorneys to coordinate their clients' criminal defense strategies.

In re Teleglobe Corporation, 493 F.3d at 364-65 (emphasis in original) (holding that the common interest rule "only applies when clients are represented by separate counsel" and stating that "[s]haring the communication directly with a member of the community [of interest] may destroy the privilege").[8] The Third Circuit's view of the law is highly persuasive because (a) it is rooted in the underlying policy considerations of the common interest rule and (b) is consistent with the rule, well-recognized in the Fourth Circuit, that the attorney-client privilege and work product doctrines should be narrowly, not expansively, applied. See ePlus, Inc., 2012 U.S. Dist. LEXIS 21636 at *7-9.

In this case, the communications between Mr. Fitch and business persons employed by Scan-Optics USA are not protected by the common interest rule because no attorney for Scan-

[8] Scan-Optics USA and Scan-Optics UK misconstrue In re Teleglobe on this point. On page 4 of its Brief, for instance, Scan-Optics USA claims that the requirement that counsel be on both sides of the communication "only applies when clients are represented by separate counsel." If that were a correct statement of the rule, then the rule would have no meaning.

Optics USA was involved in the communications. In re Teleglobe Corporation, 493 F.3d at 364-65.

Moreover, when the communications were shared, Scan-Optics USA and Scan-Optics UK did not "share a common legal interest in the shared communications." In re Teleglobe Corp., 493 F.2d at 364 (holding that, for the common interest rule to apply, "all members of the community must share a common legal interest in the shared communications"). This requirement was endorsed by the Fourth Circuit in the In re Grand Jury Subpoenas opinion, where the Court premised its finding of a "common interest privilege" between a parent corporation and its wholly-owned subsidiary on a finding "that there was a joint effort between [Parent] and Subsidiary both in the prosecution of the claim…and in defense of the…counterclaim." Id. at 246. Here, at the time of the communications in question, Scan-Optics USA had no common legal interest with Scan-Optics UK in the defense of Brainware's breach of contract claim. Scan-Optics USA was not involved in the litigation and did not expect to be involved in the litigation. For these reasons, the common interest rule does not apply to protect this category of communications from discovery.

C. Communications involving no lawyer are not protected by the attorney-client privilege or the work product doctrine ("Category 3").

Item number 74 on Scan-Optics UK's privilege log is a "draft letter" between two business persons at Scan-Optics UK that allegedly includes "information gathered to obtain legal advice" and is allegedly "work product." Applying the definitions of the attorney-client privilege and the work product doctrine to this description does not lead to the conclusion that the item is privileged or protected. First, as no attorney was involved in the communication, the person to whom the communication was made was not "acting as a lawyer" and, indeed, was not a lawyer. Furthermore, it cannot be information created by or at the direction of an attorney in anticipation of litigation. See infra Part II. That the information reflected in the draft letter may have later been shared with an attorney does not retroactively make the information contained in the draft privileged or protected.

Items 53, 58, 64, 65, 73 and 74 on Scan-Optics USA's log should also be produced. First, the assertion that these items "reflect" privileged or protected information is, at best, questionable. The log does not identify the attorney whose advice or work product is being "reflected," much less who that attorney represents. To the extent the attorney referenced here is an employee of third-party Patriarch, the materials would not be protected for the same reasons discussed above in Part III.A. Moreover, this Court has recently observed that, "[f]or entries concerning communications by non-attorneys which reflect legal advice, no privilege can apply. Lawson does not establish that these communications are communications from or to an attorney or that they are communications made at the direction of an attorney." ePlus Inc., 2012 U.S. Dist. LEXIS 21636 at *18-19. Thus, aside from the fact that the log contains insufficient information to judge the claim of privilege, in contravention of Rambus, the above statement in ePlus indicates that these communications are simply not privileged or protected in the first instance.

Another problem with these communications is that they were exchanged between Scan-Optics UK and Scan-Optics USA business persons, thus raising the issue of waiver. Even under a common interest rule analysis, Scan-Optics USA would need to show that the communications were between the attorneys for each party and, furthermore, that they were made pursuant to a joint effort by them to defend against a common legal claim. See In re Grand Jury Subpoenas, In re Grand Jury Subpoenas, 902 F.2d 244 (recognizing common interest rule when a parent and a subsidiary entered into a joint defense agreement and were clearly engaged in a "joint effort" to prosecute a claim and defend against a counterclaim on a contract in which they both had an interest); In re Teleglobe Corp., 493 F.3d at 366 (requiring attorneys to be present on both sides of the communication); United States v. Duke Energy Corp., 214 F.R.D. at 388-89 (M.D.N.C. 2003) (requiring a joint or common interest agreement to be executed for the common interest rule to apply).

D. Documents not identified by Scan-Optics UK on its privilege log are not protected from discovery and should be produced ("Category 4").

Scan-Optics UK failed to identify 10 email communications and 2 attachments in its January 6, 2012 Privilege Log and in its January 20, 2012 Supplemental Privilege Log. It now claims, for the first time, that these communications are protected from discovery by the attorney-client privilege and the work product doctrine. On June 6, 2012, the same day it filed a brief concerning its privilege log, (ECF 63), Scan-Optics UK forwarded a "Second Supplemental Privilege Log" to Brainware listing each of these items. Each of the items on the Second Supplemental Privilege Log consists of an email communication between Pete Moralee of Scan-Optics UK and one or more officers of Scan-Optics USA. Some of the communications also involve one or more lawyers employed by non-party Patriarch. The communications were sent during the time period September 6 to 12, 2011, when Brainware was threatening to file suit against Scan-Optics UK for breach of contract and at a time when Scan-Optics UK had already hired trial counsel to defend it against Brainware's breach of contract claim.

Local Rule 26(C) requires that an objection to a document request be served within fifteen (15) days of the date of service of the request. The Court's Scheduling Order, (ECF 8), provides that a party must serve its privilege log at the same time as the objections or any claim of privilege is "waived."

> Unless otherwise ordered by the Court, the claim of privilege or protection shall be waived unless the inventory and description are served with the objections to the request for production in the time required by the Local Rules.

(ECF 8, at Part III.B.) Moreover, this Court has written extensively about how deficiencies in a privilege log may lead to waiver of the privilege. See EPlus, Inc. v. Lawson Software, Inc., No. 3:09cv620, 2012 U.S. Dist. LEXIS 21636 (E.D. Va. February 21, 2012); Rambus, Inc. v. Infineon Technologies, 220 F.R.D. 264 (E.D. Va. 2004).

In an effort to avoid producing the 12 items, Scan-Optics UK now takes the position that these items were "outside the scope of discovery" and "irrelevant" when it initially served objections to Brainware's document requests in January 2012, and they did not become "relevant" until the Court recently dismissed Scan-Optics USA's motion to dismiss the alter-ego claims in Brainware's First Amended Complaint. (Scan-Optics UK Brief at 18-20.) Scan-Optics UK argues that the documents relate only to its "corporate structure" and are "wholly unrelated to Brainware's breach of contract claim in its initial Complaint." Id. at 19-20.

Scan-Optics UK's argument is implausible. Scan-Optics UK takes the inconsistent position in its Second Supplemental Privilege Log that each of these items is protected "work product." To qualify as work product, the items must, by definition, relate to the anticipated breach of contract litigation against Brainware because that was the only litigation Scan-Optics UK anticipated in September 2011, when the emails were created. (The alter ego claim to which Scan-Optics UK insists these emails relate was not raised until January 2012 in a motion to amend the complaint.) If the materials are, as Scan-Optics UK now claims, "wholly unrelated" to Brainware's breach of contract claim, then one must wonder how the materials could possibly have been created "in anticipation of" defending against that claim in September 2011.

Interestingly, Scan-Optics UK does not claim that the documents are not responsive to Brainware's document requests. Indeed, the documents clearly are responsive given that Scan-Optics USA identified them on its privilege log and Scan-Optics UK followed suit on its Second Supplemental Privilege Log. Rather, Scan-Optics UK argues that it was entitled to unilaterally declare the emails "irrelevant," which somehow gets around the obligation to identify responsive and privileged documents on its privilege log. Scan-Optics UK has cited no authority for that proposition. It cites to Federal Rule of Civil Procedure 26(b)(5)(A), which provides that a party must identify items on a privilege log that are "otherwise discoverable." Scan-Optics UK interprets this as a license to avoid the privilege log requirement whenever, in its sole discretion, it deems a document request to seek "irrelevant" information. But that is not what the Rule states. The remedy for a document request that seeks "irrelevant" information is to object on that basis or to file a motion for a protective order.

Moreover, this interpretation is incongruent with Rule 34(b)(2)(B), which prescribes the manner in which a party must respond to a request for documents: "For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." (emphasis added). A party may not unilaterally raise a "relevance" objection, and thereby avoid including all of the other "reasons" it objects to a request. This includes privilege objections, which must be specifically raised simultaneously with other objections, including relevance objections. The Local Rules and this Court's Scheduling Order do not distinguish between the time to raise relevance objections and privilege objections. If a document is requested in discovery that the opposing party feels is irrelevant and privileged, then the document must be identified on the privilege log even though the party feels it is irrelevant. The documents on Scan-Optics UK's Second Supplemental

Privilege Log were no less responsive in January 2012 than they are now, and they should have been identified on the privilege log at that time if they are truly privileged.

Scan-Optics UK's argument is also misguided by its belief that it was relieved of the obligation to respond to discovery into its corporate structure while co-defendant Scan-Optics USA moved to dismiss the alter ego claim and moved for a stay of discovery as to it. As the Court will recall, Scan-Optics UK raised an identical argument during the May 10, 2012 conference call with the trial judge concerning its failure to produce financial information relating to the alter ego claim while the motion to dismiss and to stay discovery were pending. The trial judge indicated during the conversation that discovery on the alter ego issues from Scan-Optics UK was not hindered by the motion to stay and also noted that Scan-Optics UK had not filed a motion to stay itself.

This argument also ignores a major gap in the procedural history and, furthermore, is based on an incorrect assumption. At the February 15, 2012 pretrial conference, the Court permitted Brainware to amend its Complaint to raise the alter ego claim against Scan-Optics USA and entered an order allowing "expedited discovery" into that issue. By Scan-Optics UK's own argument, discovery into its "corporate structure" immediately became "relevant" at that time. Nevertheless, Scan-Optics UK continued in its failure to produce clearly relevant documents or to supplement its privilege log to identify such items. It was not until one month later, on March 14, 2012, that Scan-Optics USA filed a motion to stay discovery concerning discovery that had been issued to it by Brainware. (See ECF 36.) Scan-Optics UK offers no explanation for why, during that one month period, it did not supplement its document production or its privilege log. It also fails to explain why it relied on Scan-Optics USA's motion to stay discovery and assumed that it tolled or suspended its own obligations to produce responsive information.

The bottom line is that this Court's Scheduling Order clearly required Scan-Optics UK to itemize these 12 emails and attachments on its privilege log and it failed to do so until last week. Under the Local Rules, the Scheduling Order, and this Court's previous rulings in other cases, any claimed privilege has been waived and the items should be produced.

Conclusion

In conclusion, Brainware respectfully moves the Court to conduct an in camera review of the documents that are still at issue between the parties, which Brainware understands have been previously submitted for review by the Defendants. Brainware further moves the Court to enter an order compelling production of those documents to which no privilege or protection attaches, or for which such protections have been waived, as more fully described in this Brief.

Respectfully submitted,

BRAINWARE, INC.

By: *Kevin W. Mottley*

Kevin W. Mottley
The Mottley Law Firm
Counsel for Plaintiff Brainware, Inc.
1700 Bayberry Court, Suite 203
Richmond, Virginia 23226
Ph: 804-930-1022
Fax: 804-767-2592
Email: *kevinmottley@mottleylawfirm.com*

Of Counsel:
James Zubok
President, Brainware, Inc.
20110 Ashbrook Place, Suite 150
Ashburn, VA 20147
Ph: 703-948-5890
Fax: 703-948-5891

CERTIFICATE OF SERVICE

I certify that, on June 14, 2012, I caused the foregoing document to be served by email upon the following counsel of record for Defendant in this matter using the Court's ECF system, which caused the document to be so served:

Charles Michael, Esq.
Brune & Richard LLP
One Battery Park Plaza
New York, New York 10004
cmichael@bruneandrichard.com

Daniel L. Fitch, Esq.
Wharton, Aldhizer & Weaver PLC
100 South Mason Street
Harrisonburg, Virginia 22801
dfitch@wawlaw.com

Robert R. Musick, Esq.
ThompsonMcMullan, P.C.
100 Shockoe Slip
Third Floor
Richmond, VA 23219
bmusick@t-mlaw.com

Kevin W. Mottley
Kevin W. Mottley (VSB No. 40179)
Counsel for Plaintiff Brainware, Inc.
The Mottley Law Firm PLC
1700 Bayberry Court, Suite 203
Richmond, Virginia 23226
Ph:804-930-1022
Fax:804-767-2592
Email: *kevinmottley@mottleylawfirm.com*